FILED
FEB 18 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1954.

No. 606.

ISADORE LENZNER and FREDA LENZNER,
Petitioners,

v.

CITY OF TRENTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

ROBERT T. MCCRACKEN,
GEORGE G. CHANDLER,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Attorneys for Petitioners.

International, 256 Chestnut St., Phila. 6, Pa.

INDEX TO PETITION.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
1. The Proposed Taking of Petitioners' Property by Condemnation Is Not for a Necessary Public Use But for a Private Purpose, and Constitutes a Misuse of the Power of Eminent Domain in Violation of Petitioners' Constitutional Right of Property	12
2. The City of Trenton Has Not Acted in Good Faith and Its Abuse of the Power of Eminent Domain Is a Judicial Question to Be Decided and Rectified Only After Full Inquiry	17
3. The Refusal of a Plenary Trial Upon the Issues of Purpose, Necessity and Good Faith Constitutes a Denial of a Fundamental Right, Is a Material Departure from the Procedural Requirement of Due Process, and Is Violative of the Fourteenth Amendment to the Constitution of the United States	18
CONCLUSION	23

OCT 31 1957

235342

TABLE OF CASES CITED.

	Page
Barr v. Essex Trades Council, 53 N. J. E. 101 (Chancery 1894)	15
Cabinet v. Shapiro, 17 N. J. Super. Ct. 540 (Law Div. 1949)	19
City of Trenton v. Lenzner, 22 N. J. Super. Ct. 415 (Law Div. 1952)	4
29 N. J. Super. Ct. 514 (App. Div. 1954)	2,7
16 N. J. Reports 465	2,8
Columbia Delaware Bridge Co. v. Geisse, et al., 34 N. J. L. 268; Aff. 35 N. J. L. 558 (E. & A. 1871)	15
35 N. J. L. 474; Aff. 36 N. J. L. 537 (E. & A. 1873)	15
38 N. J. L. 39; Aff. 38 N. J. L. 580 (E. & A. 1876)	15
In Matter of Highway, 22 N. J. L. 293 (Sup. Ct. 1849)	15
In re The Buckeye Pipe Line Co., 13 N. J. 385, 389 (1953)	4
Martin v. Mazziotti, 11 N. J. Reports, 287 (1953)	19
Mayflower Industries v. Thor Corp., 15 N. J. Super. Ct. 139 (1951)	19
Miller v. Atlantic Gas Ins. Co., 16 N. J. Super. Ct. 531 (Law Div. 1951)	19
Mulligan v. Perth Amboy, 52 N. J. L. 132, 134 (Sup. 1889)	4
Sartor v. Arkansas Gas Corp., 321 U. S. 620 (1944)	21
Scaturchio v. Jersey City Incinerator Authority, 14 N. J. Reports 72 (1953)	15
State v. Chapman, 69 N. J. L. 464; Aff. 70 N. J. L. 339 (E. & A. 1904)	15
Tsibikas v. Morrof, 5 N. J. Super. Ct. 306 (App. Div. 1949)	19
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952)	15

TABLE OF STATUTES.

	Page
28 U. S. C., Sec. 1257(3)	2
Federal Rule of Civil Procedure 56(c)	19, 21
New Jersey Revised Rules of Court 3:56-3, 4:85—1-7, 4:92—1-13	5, 12, 19
New Jersey Eminent Domain Act (R. S. 20:1-2, P. L. 1953, c. 20, and R. R. 4-92, et seq., and 4:85, et seq., all effective July 1, 1953)	5, 12, 18, 22
New Jersey Laws of 1942, c. 138 (N. J. S. A. 40:60-25.1)	3, 8
New Jersey Laws of 1948, c. 198 (N. J. S. A. 40:11A-1 et seq.)	3
Ordinance of City of Trenton—May 29, 1952	3, 4

INDEX TO APPENDIX.

	Page
PLAT OF SITE	2a
CITY OF TRENTON v. LENZNER—MAJORITY OPINION	3a
CITY OF TRENTON v. LENZNER—MINORITY OPINION	15a

IN THE

Supreme Court of the United States.

October Term, 1954.

No. .

ISADORE LENZNER AND FREDA LENZNER,
Petitioners,

v.

CITY OF TRENTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Your petitioners, Isadore Lenzner and Freda Lenzner, respectfully pray the issuance of a writ of certiorari to the Supreme Court of New Jersey to review the judgment and decision of that Court rendered on November 22, 1954, which judgment and decision affirmed the decision of the Superior Court of New Jersey, Appellate Division, of February 8, 1954. Said judgment of the said Appellate Division affirmed the summary judgment of the Superior Court of New Jersey, Law Division, rendered on October 23, 1953, in an eminent domain proceeding to condemn the property of petitioners for parking purposes in accordance with an ordinance of the City of Trenton.

Opinions Below.

The majority and dissenting opinions in the Supreme Court of New Jersey are reported at 16 N. J. Reports 465 and 479.

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 29 N. J. Superior Court 514 (App. Div. 1954).

Jurisdiction.

The judgment of the Supreme Court of New Jersey affirming the judgment of the Superior Court of New Jersey, Appellate Division, which latter judgment affirmed the summary judgment of the Law Division for respondent, was dated and entered on November 22, 1954.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 United States Code, Sec. 1257(3).

Questions Presented.

The questions presented by this petition are:

1. Whether the condemnation is necessary and will actually provide greater parking facilities for the public than those now supplied by your petitioners as private owners;

2. Whether the City of Trenton acted in good faith in condemning the property of petitioners for parking purposes or has exercised its power of eminent domain ostensibly for a public use, but in reality for a private use; and

3. Whether petitioners are entitled to a plenary trial on the controversial issues of public necessity for and the good faith of the City of Trenton in condemning their property.

Statement of the Case.

Petitioners own certain lots in the central business district of the City of Trenton and also have a leasehold interest in certain adjoining rear lots, upon which very large tract of land petitioner, Isadore Lenzner, has operated a profitable parking yard for the public for a period of 25 years. Petitioners' property has a large frontage on the south side of Academy Street midway between North Broad and North Montgomery Streets and extends in equal depth through to East Hanover Street. A plat of its location is attached to the Appendix of this petition.

The Board of Commissioners of the City of Trenton created a Parking Authority in 1948 with the powers and duties provided by L. 1948, c. 198 (N. J. S. A. 40:11A-1 et seq.), which Authority recommended your petitioners' property as the best mid-city site for the creation of a ramp-type garage and further recommended that it be acquired by the City under the authority of L. 1942, c. 138 (N. J. S. A. 40:60-25.1) because the costs thereof would exceed the financial capacities of the Authority. On May 29, 1952, the Board of Commissioners adopted an ordinance for the acquisition of your petitioners' property for the public parking of vehicles, which ordinance ordained in pertinent part (37a):

> "1. That pursuant to the provisions of chapter 138 of the Laws of 1942, R. S. 40:60-25.1, et seq., it is hereby determined that the City of Trenton shall acquire by purchase or condemnation the following described lands for the purpose of making the same available to the public for the public parking of vehicles.
>
> • • •
>
> "4. The City Counsel be and is hereby authorized and directed to negotiate with the owners for the purchase of said lands, and upon failure to arrive at a price satisfactory to the city to institute condemnation

proceedings for the purpose of acquiring said lands in the manner provided by law."

Petitioners attacked the validity and constitutionality of the ordinance by Complaint "In Lieu of Prerogative Writ of Certiorari" filed on June 23, 1952 in the Law Division of the Superior Court of New Jersey on the grounds, inter alia, (1) that it was the intention and purpose of the Ordinance and the Board of Commissioners to acquire the property and parking yard business of petitioners without making just compensation therefor and then to operate and use the same for its own uses, purposes and profits, (2) that the Ordinance set forth no public necessity or purpose for the acquisition, and (3) that such intention and purpose violated the personal, legal and constitutional rights of petitioners under the Laws and Constitutions of the State of New Jersey and of the United States of America (47a to 51a).

No affidavits, answer or other pleading was interposed by the City of Trenton, which moved for and obtained an order for a summary judgment. The court did not pass on the factual, legal or constitutional grounds which had been raised other than to presume an intention on the part of the City of Trenton to make compensation for the business as well as for the land, and upheld the right of the City to have and exercise the power of condemnation even after creating a Parking Authority. See *City of Trenton v. Lenzner,* 22 N. J. Super. 415, 423. (Law Div. 1952).

This attack *in limine* upon the Ordinance was required under the Administrative or Statutory Eminent Domain practice and procedure that prevailed prior to July 1, 1953. See *Mulligan v. Perth Amboy,* 52 N. J. L. 132, 134 (Sup. 1889) and *In re The Buckeye Pipe Line Co.,* 13 N. J. 385, 389 (1953).

No appeal was taken from this interlocutory, summary judgment. Nor was the validity of the ordinance relitigated in the subsequent civil action brought by the City. In that judicial proceeding, petitioners assailed the exer-

cise of the power, not its existence, upon the grounds that the City was not acting in good faith and for a public purpose in seeking to take petitioners' property. The initial administrative proceeding was, therefore, no bar to the court's jurisdiction and duty to inquire into and determine whether the City was lawfully exercising its power of eminent domain.

Thereafter, the City of Trenton did not negotiate for the acquisition by purchase of petitioners' property; but pursuant to the new judicial practice and procedure under the Eminent Domain Act (R. S. 20:1-2, P. L. 1953, c. 20, and R. R. 4:92, et seq., and 4:85, et seq., all effective July 1, 1953) it instituted on August 4, 1953, a civil action in the Superior Court to acquire the property of petitioners by condemnation. The 1953 Act provides:

> "* * * In any such action, the court shall have and shall exercise its full jurisdiction, including jurisdiction to determine the right to exercise the power of eminent domain; * * *" (R. S. 20:1-2, P. L. 1953, c. 20) (cf. Rules 4:85-1 to 7; 4:92-1 to 13).

The Complaint of the City of Trenton alleged that it had determined it was reasonably necessary to acquire by condemnation the property of petitioners and demanded judgment and the appointment of condemnation commissioners (2a to 3a). The Answer of petitioners denied the allegations of the Complaint and averred to the contrary that the City of Trenton sought to acquire the property and parking yard business of petitioners not for itself in a governmental capacity but for other and private interests, that this condemnation proceeding was not reasonably necessary, and that the City's determination to exercise the power of eminent domain was not in good faith (9a to 10a).

The Answer set forth six separate defenses, which raised the following factual and legal issues, namely: (1) whether any definite and immediate intention or purpose for the acquisition existed (D33a-26), (2) whether the in-

tention and purpose of the acquisition was simply to take the property off the market without intention for immediate use, (3) what disposition and method of use and operation the City intended to make of the property after the acquisition, (4) whether the use and operation of the property would be far in the future and that therefore no public use or necessity now was shown or existed, (5) whether ultimately the acquisition would be the taking of private property for private use and thereby divest the owners of their private property and vest it in another private party, (6) whether the proposed acquisition was for the benefit of a limited group of private interests, (7) whether the City sought to acquire the property in a proprietary or a governmental capacity, and (8) whether the action by the City under the circumstances was inequitable (10a to 17a).

In support of the averments of the Answer, petitioners submitted affidavits by Isadore Lenzner, one of petitioners, and the depositions by oral examination in pretrial discovery of the Mayor, the City Traffic Engineer and the Executive Secretary of and Counsel for the Parking Authority, which affidavits and depositions disclosed without contradiction (a) that the only decision the City of Trenton and its Board of Commissioners had presently made was to take the property of petitioners and that the manner of its use after acquisition might not be determined for upwards of 10 years and possibly by a subsequent Board, (b) that the City's immediate purpose and intention in acquiring petitioner's property was to take it off the market and thus prevent its sale and use in the future for a store or some other private business enterprise, and (c) that there had been some discussion about building a ramp garage on the site for public use but no one had the slightest notion as to what actually would be done with it (D190a-17, 191a-24, 192a-27 to 193a-4, 206a-13, 210a-15, 235a-35, 236a-17, 246a-28, 247a-4, 252a-28, 253a-6, 262a-35, 264a-17, 267a-5, 272a-37, 273a-17).

Petitioners claimed but were denied a trial on these issues. A pretrial conference was held; but there was no

settlement of such issues because of an inability to agree. A motion for summary judgment was made by the City of Trenton at the suggestion of the trial court, was returnable on the day set for trial and was granted by the Superior Court, Law Division, because allegedly the pleadings and proofs showed palpably that there was no genuine issue as to any material fact and that the City of Trenton had a right to such judgment as a matter of law (D91a-24 to 92a-13).

From that summary judgment an appeal was taken to the Appellate Division of the Superior Court. The Appellate Division raised but did not determine the question whether the appeal was premature. It held in affirmance of the trial court that the pleadings and proofs revealed no genuine issue as to any material fact and that there was no substantially prejudicial deprivation of rights of petitioners by reason of the trial court's failure to afford them a plenary trial. See *City of Trenton v. Lenzner,* 29 N. J. Superior Court 514 (App. Div. 1954).

On appeal to the Supreme Court of New Jersey petitioners specifically raised and argued the following questions, viz:

1. Did the trial court erroneously deny petitioners' constitutional right to a trial, with or without a jury, and enter a summary judgment in view of the numerous issues of fact and law, and of respondent's burden of proof?

2. Was the proposed acquisition by condemnation in a private, proprietary and commercial capacity violative of petitioners' constitutional right?

3. Was the proposed acquisition without jurisdiction and unconstitutional because there was no public use, purpose or necessity shown and was merely for a private use for the benefit of a limited group of private interests or private party, and for the purpose of taking petitioners' property and parking yard business off the market?

4. Were all jurisdictional requirements complied with and were there bona fide negotiations by the City for the payment of constitutional compensation for all the elements involved?

5. Was the proposed acquisition inequitable, arbitrary, confiscatory, an abuse of power, and an unwarranted and unconstitutional seizure of property?

6. Was the proposed acquisition violative of the constitutional rights of petitioners under the Constitutions of New Jersey and the United States, and contrary to the law of the land?

Because the City of Trenton in its brief, at the oral argument and again at the reargument, reiterated that it intended to build a multi-story ramp garage on petitioners' property, which assertion was questioned by petitioners, counsel for the City agreed at the reargument that the City would put its determination with respect thereto in binding legal form. The decision of the case was consequently delayed pending such action. In due course counsel for the City advised the Supreme Court by letter that the City was unwilling to commit itself to the position its counsel had taken in its brief and at the oral arguments. See dissenting opinion of Chief Justice Vanderbilt in 16 N. J. Reports at pages 479-80. Petitioners were not notified of this letter.

The majority opinion of the Supreme Court of New Jersey delivered by Justice Jacobs and the dissenting minority opinion by Chief Justice Vanderbilt were in agreement upon the general principles of law that the taking of private property to provide increased parking facilities for the public constituted a public use, and that the City of Trenton had the power under L. 1942, c. 138 to condemn petitioners' property for that public purpose; but disagreed upon the controversial issues of (1) whether the condemnation of petitioners' property would provide greater parking facilities for the public, (2) whether the present condemnation was in good faith, and (3) whether petitioners were en-

titled to a plenary trial upon the said issues of necessity and good faith.

Erroneously presuming that the City intended and planned to build a ramp-type garage upon petitioners' property after its acquisition, the majority opinion concluded that the condemnation would increase the City's public parking facilities and that the City's determination to acquire petitioners' property by condemnation was in no wise tainted by fraud or bad faith and did not constitute an abuse of its broad discretionary powers. In a palpable contradiction of its mistaken presumption, the majority opinion referred to the Mayor's testimony that "the only decision actually made by the City was to acquire the property in accordance with the ordinance"; and then indulged in the further presumption that after the acquisition "the Board of Commissioners, in the faithful discharge of its official duties and the proper exercise of its discretion, will be obliged to determine what precise manner of operation will best serve to increase the parking facilities".

In contrast thereto, the dissenting minority opinion of Chief Justice Vanderbilt called specific attention to the City's refusal at the bar of the Supreme Court of New Jersey to commit itself to the position its counsel had taken and reiterated in his brief and at the oral arguments, namely, that the City "intended to build a multi-story ramp garage on the premises in question"; and stated that the only inference which could be drawn from that refusal was "i. e., that the use to which the City would put the property after condemnation would result in no greater parking facilities for the public than it is now obtaining through private ownership". The Mayor's oft-repeated testimony that no determination had as yet been made and might not be made for upwards of 10 years respecting the use to be made of petitioners' property after condemnation has been heretofore noted (p. 6 ante).

Anent the question of good faith, and, more particularly the disputed issues of public necessity for the taking

and whether the intended use after acquisition would be private or public, the majority opinion held that (1) "there was no basis whatever for inferring that the City's determination that it was necessary to acquire the Lenzner property (though other properties were available) was in anywise tainted by fraud or bad faith or constituted an abuse of its broad discretionary powers"; and (2) the fact that the City had the discretionary power to choose after condemnation between public and private construction and operation of petitioners' property and had considered it unwise to commit itself thereon in no wise suggested fraud, bad faith or abuse.

Contrariwise, the minority opinion stated that the conduct of the City before the Supreme Court, as previously outlined, strongly indicated it was not acting in good faith; that a factor deepening such impression was the City's failure to use a property it owned, which property was directly opposite petitioners' and equally sizable, was obviously quite as desirable, and had been practically abandoned for years, particularly since its use would double the City's parking facilities in that part of Trenton without the necessity of constructing any new buildings; and that there was no substance to the argument by the City that if it did not acquire petitioners' property now there was "always the danger that the owners will sell it for a department store, or other multi-story building and so decrease the amount of parking facilities available to the public".

Chief Justice Vanderbilt declared that because the City could without competitive bidding lease petitioners' property acquired by condemnation to a private individual or corporation for a parking lot at a profit, the possible and apparent danger to the public welfare and morals inherent in such an arrangement required the clearest proof of the City's good faith before it should be permitted to exercise the power of condemnation. The imminence of such a hazard was accentuated by the uncontradicted testimony that negotiations for the private operation of petitioners' prop-

erty were being actively carried on as late as August 19, 1953 (D208a-32 to 210a-40).

With respect to a plenary trial of the issues of good faith and necessity for the condemnation, the majority opinion concluded that there was no genuine issue as to any material fact and that the trial court was right in disposing of the present case by summary judgment; whereas the minority opinion maintained that a plenary trial was imperative upon the questions of good faith and necessity and whether petitioners' property was being taken "ostensibly for a public use but in reality for a private use", which questions could not be disposed of on a motion for summary judgment.

Chief Justice Vanderbilt aptly pointed out that the granting of such a trial would preclude the possibility of a wrongful exercise of the power of eminent domain, under which petitioners would be forced to submit "to having a valuable business taken away from them in the guise of serving the public interest without there being any increase in the parking facilities in the city, only to find that their business may be turned over by the city to another individual or private corporation to conduct at a profit".

Reasons for Granting the Writ.

The writ of certiorari should be allowed in the present case, because

1. The proposed taking of petitioners' property by condemnation is not for a necessary public use but for a private purpose, and constitutes a misuse of the power of eminent domain in violation of petitioners' constitutional right of property.

2. The City of Trenton has not acted in good faith and its abuse of the power of eminent domain is a judicial question to be decided and rectified only after full inquiry.

3. The refusal of a plenary trial upon the issues of purpose, necessity and good faith constitutes a denial of a fundamental right, is a material departure from the procedural requirement of due process, and is violative of the Fourteenth Amendment to the Constitution of the United States.

In considering these reasons, it should first be noted that the present condemnation proceedings were brought pursuant to the new practice and procedure under the New Jersey Eminent Domain Act (R. S. 20:1-2, P. L. 1953, c. 20 and R. R. 4:92, et seq., and 4:85, et seq., all effective July 1, 1953), which procedure is judicial and not administrative or statutory. The judicial method provides for the institution of a civil action in the Superior Court, Law Division, of New Jersey and further provides that the court in such action shall have and exercise "its full jurisdiction, including jurisdiction to determine the right to exercise the power of eminent domain".

The pleadings in the present case consisted of a complaint, an answer, a reply and an answer to new matter in the reply. Respondent, City of Trenton, had the burden of proving that it possessed the power of eminent domain, the public use and necessity therefor, its inability to agree with the owners, its intention to complete the project and due compliance with all preliminary steps. Concededly the trial judge did not hear any oral testimony and afford the defendants (i. e., petitioners) a trial.

1. *The proposed taking of petitioners' property by condemnation is not for a necessary public use but for a private purpose, and constitutes a misuse of the power of eminent domain in violation of petitioners' constitutional right of property.*

That the public would not be provided with greater parking facilities than the private owners (i. e., petitioners) were supplying and that there was no present necessity for

condemning petitioners' property and parking yard business was convincingly established by the actions and conduct of the City of Trenton. First, it refuted the statement of counsel in its brief, at the oral argument and again at the reargument before the Supreme Court of New Jersey that the City intended to build a multi-story ramp garage on petitioners' property after condemnation; and refused to commit itself or put its determination in that respect in binding legal form. Second, the Mayor repeatedly testified that the City had made no decision or determination as yet beyond that of taking petitioners' property, that the decision and determination as to what use would be made and in what manner of petitioners' property after the taking might not be made for upwards of 10 years and by a subsequent Board of Commissioners, and that the immediate intention and purpose of acquiring petitioners' property and parking yard business was to take it off the market and thus prevent it being sold for other private enterprise uses such as the construction of a store (D190a-17, 191a-24, 192a-40 to 193a-4, 204a-9, 25, 32, 206a-13, 210a-15, 235a-35, 236a-17).

Third, the City Traffic Engineer testified that the City wanted to get the land first and then decide what to do with it; and that the immediate intention and purpose of getting the land was to prevent its sale for other private uses such as a store (D246a-28, 247a-4, 252a-28, 253a-6). Fourth, counsel and Executive Secretary of the Trenton Parking Authority stated in his testimony that the Authority went to the City with a strong recommendation that the property be acquired in the first place so that it would be preserved for parking and not become a Macy Department Store or something of that sort; and that he did not have the slightest notion what the City Commissioners were going to do with the property and how it would be operated, and was uncertain "unless private enterprise winds up with it" (D262a-35, 264a-17, 267a-5, 273a-11, 17). Finally, the Coverdale & Colpitts survey and report recommended

that petitioners' parking yard should be taken off the market (D263a-15, 272a-37). The denial of a plenary trial prevented the production of that report under a subpoena duces tecum at the deposition hearing in pretrial discovery, which subpoena the officials of the City of Trenton had refused to honor (D182a-12 to 183a-27).

The uncontradicted evidence that there was no present urgent need to increase existing parking facilities is corroborated by the failure of the City to make use of the practically abandoned property directly opposite that of petitioners and thus double the parking facilities of that section of Trenton without constructing any new buildings. The existence of this available parking site helps to explain the purpose underlying the City's determination to take petitioners' property off the market, viz., to prevent a business change of use rather than to increase parking facilities.

That petitioners' property was to be taken for a private, not public purpose, and further that there was a reasonable basis for the fear expressed in the minority opinion that ultimately petitioners' property and parking yard business might be turned over by the City to another individual or private corporation to conduct at a profit, is shown by the testimony in pretrial discovery of the Mayor, the City Traffic Engineer and the Executive Secretary of the Authority. The averments in petitioners' answer and in the affidavits of Isadore Lenzner, which averments disclose that the City of Trenton is seeking to take petitioners' property for private use and the benefit of a limited group of interests, are also corroborative of the private purpose that underlies the condemnation.

Another circumstance directly bearing upon the inequity of the proposed condemnation of petitioners' property is the fact that while the City has other lands available for parking purposes in the immediate neighborhood, yet there is no other place in that vicinity to which petitioners can move or conduct their parking yard business. The effect of the proposed condemnation will be an irreparable

and total destruction of petitioners' parking yard business and the receipt by the City of Trenton for its own uses, purposes and profits of all the rents, profits and income to be derived from the operation of petitioners' property as a parking lot. In view of the constitutional jurisdiction of courts of law in New Jersey to grant complete equitable relief, such an unjust result should never be tolerated in the absence of a true emergency for the seizure and confiscation. See *Scatuorchio v. Jersey City Incinerator Authority*, 14 N. J. Reports 72 (1953) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

Throughout the present civil action of eminent domain the City of Trenton has insisted that it was taking only the lands of petitioners and not their parking yard business. The complaint expressly provides compensation for the lands by metes and bounds, but has no provision whatever for the fixing of compensation for the taking of the parking yard business (D29a-23). In reiteration thereof, the reply of the City alleges that "it is immaterial whether or not there is another location in the vicinity of the defendants' present place of business, or any other location to which said defendant can move or conduct its business" (D32a-39). But this inequitable contention disregards Article I, Section 1 of the 1947 New Jersey Constitution, under which there is a natural and unalienable right to acquire, possess and protect property. Since a parking yard business is property (Cf. *Barr v. Essex Trades Council*, 53 N. J. E. 101 (Chancery 1894); *State v. Chapman*, 69 N. J. L. 464, Aff. 70 N. J. L. 339 (E. & A. 1904); *Columbia Delaware Bridge Co. v. Geisse et al.*, 34 N. J. L. 268, Aff. 35 N. J. L. 558 (E. & A. 1871); *Columbia Delaware Bridge Co. v. Geisse et al.*, 35 N. J. L. 474, Aff. 36 N. J. L. 537 (E. & A. 1873); *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39, Aff. 38 N. J. L. 580 (E. & A. 1876); and *In Matter of Highway*, 22 N. J. L. 293 (Sup. Ct. 1849)), petitioners cannot be deprived of that business without just and equitable compensation under the Fourteenth Amendment.

Although the issue of just compensation had not yet been decided, the majority opinion warns that due regard must be given to the value of petitioners' parking yard business in determining just compensation for the taking by emphasizing (a) that under the law of New Jersey the measure of just compensation is "fair market value"; and (b) that, although the property owner may not be entitled to independent compensation for the value of the business necessarily destroyed by the taking, yet a foremost factor in determining what is just and equitable compensation is "prospective earning power evidenced in considerable part by past earnings". It remains to be seen whether or not the consequential loss of petitioners' parking yard business will be given fair and equitable consideration as an element of the just compensation rightly due to petitioners as owners of that business.

It is hornbook law requiring no citation of authority that public use as well as the necessity of the acquisition are essential prerequisites to a valid exercise of the power of eminent domain. The minority opinion declares that "the Constitution forbids the condemnation of property for private use", that "when land is thus taken, ostensibly for a public use, but in reality for a private use, the invasion of the individual's constitutional right of property is remedial by judicial action" and that the power of condemnation in municipalities for off-street parking facilities may be exercised only "if by doing so the public will be provided with greater parking facilities". The minority opinion observed that "the courts have never permitted statutes to be used in such a way as to pervert their true objective by a mere colorful compliance with their requirements" and that "an abuse of the statutory discretion and power is as objectionable here as in other fields of governmental action."

It is respectfully submitted that the pleadings and proof in the present case clearly establish the misuse by the City of Trenton of its power to condemn private property

by taking petitioners' property for an unnecessary private use that will not increase public parking facilities.

2. *The City of Trenton has not acted in good faith and its abuse of the power of eminent domain is a judicial question to be decided and rectified only after full inquiry.*

Of the many factors disclosing the lack of good faith on the part of the City of Trenton in condemning petitioners' property, perhaps the most cogent circumstance is the action of the City before the Supreme Court of New Jersey. In order to show that the public would be provided with greater parking facilities by the condemnation, counsel for the City in its brief, at the oral argument, and again at the reargument, reiterated that the City "intended to build a multi-story ramp garage on the premises in question". In passing it should be noted that this statement was completely at variance with the testimony of the Mayor, the City Traffic Engineer and the Executive Secretary of the Trenton Parking Authority. Under these circumstances it is not surprising that the City in refutation of its counsel was forced to advise the Court of its unwillingness to commit itself to such a present intention and plan.

Another illustration of the City's lack of good faith in condemning petitioners' property is the reluctant admission that the City has no present intention or plan with respect to that property other than to take it off the market and thus prevent its use for some other business purpose. It flatly refused to bind itself to build a multi-story ramp garage or to increase the parking facilities of petitioners' property in any other manner.

A third factor showing that the City was not acting in good faith in condemning petitioners' property is its unexplained and unexplainable failure to make an abandoned school site into a public parking lot even though such conversion would double the parking facilities of the particular

section of Trenton without constructing a garage or any new buildings thereon.

A fourth and final factor evidencing the lack of good faith on the part of the City is its conduct in negotiating for the possible operation of petitioners' property by a private individual or corporation as a parking lot at a profit. These negotiations were being actively conducted up to the institution of the condemnation proceedings because in view of financial problems the City and the Authority might be better off to have petitioners' property operated by private enterprise (D262a-13 to 21, 265a-22 to 36, 266a-32 to 267a-12).

It is respectfully submitted that the actions and conduct of the City of Trenton with respect to the condemnation of petitioners' property have at every stage demonstrated the absence of good faith on the part of the City. This lack of good faith is likewise a judicial question which should not be summarily disposed of without a full hearing on the merits.

3. *The refusal of a plenary trial upon the issues of purpose, necessity and good faith constitutes a denial of a fundamental right, is a material departure from the procedural requirement of due process, and is violative of the Fourteenth Amendment to the Constitution of the United States.*

The avowed statutory purpose of the 1953 Eminent Domain Act in changing the practice and procedure from administrative to the judicial method was to confer upon the Superior Court the full power, right and duty to determine whether the power of eminent domain was being rightly exercised. In order to assure a full judicial inquiry into this basic question, the Act provided for the institution of a civil action in the Superior Court with the filing of pleadings (complaint, answer, etc.) and a trial on the return day.

An eminent domain proceeding now follows the same procedure as a civil action in the Law Division of the Superior Court. This necessarily involves the usual pre-trial procedure, including the right of discovery, the taking of depositions, the submission of interrogatories and other preliminary proceedings provided by the rules of court, a formal pre-trial conference with its usual features, and an actual trial of the issues of fact and law involved.

The defendant in a civil action of eminent domain is entitled to his day in court by a formal trial because the numerous issues of fact and law incident to condemnation cannot be adequately presented on a motion for summary judgment with only ex parte proofs and the pleadings before the court. The minority opinion of the Supreme Court asserts that where as here the conduct and acts of the condemnor clearly show a lack of necessity for the condemnation, as well as a lack of good faith, it becomes imperative that there shall be a full judicial inquiry in order to make sure that the power of eminent domain is being truly exercised for a rightful public purpose.

It is well settled under the decision law of New Jersey that a summary judgment should not be granted if there is any genuine issue of fact presented by the record and that when the facts are in dispute, the trial court has no alternative but to deny a motion for summary judgment and submit the issues to formal trial. See *Tsibikas v. Morrof*, 5 N. J. Super. Ct. 306 (App. Div. 1949) at page 310; *Cabinet v. Shapiro*, 17 N. J. Super. Ct. 540 (Law Div. 1952); *Miller v. Atlantic Cas. Ins. Co.*, 16 N. J. Super. Ct. 531 (Law Div. 1951); and *Martin v. Mazziotti*, 11 N. J. Reports 287 (1953).

Rule 3:56-3 of New Jersey, which was taken from Federal Rule 56(c) and provides that summary judgment shall be granted only if the pleadings, depositions, admissions and affidavits show palpably that there is no genuine issue as to any material fact, was construed in the case of *Mayflower Industries v. Thor Corp.*, 15 N. J. Super. Ct. 139 (1951) to mean (pp. 155-56):

"The quoted language of this rule was taken from Federal Rule 56(c). Under the construction of the federal courts, this language was not designed 'to cut litigants off from their right of trial by jury if they really have issues to try', and summary judgment should be granted only where 'no genuine issues remain for trial'. Chappell v. Goltsman, 186 F. 2d 215 (C. C. A. 5th Cir. 1950). The matter cannot be decided on the affidavits of the parties where the facts are in dispute or where conflicting factual inferences may be drawn from them. Arnstein v. Porter, 154 F. 2d 464 (C. C. A. 2d Cir. 1946); Chappell v. Goltsman, supra. 'Affidavits . . . are of value only when they indicate the non-existence of factual issues and they have no value when they attempt to resolve a factual issue in favor of one of the parties'. Kaiser Co. v. Ric-Wil Co., 95 Fed. Supp. 54, 55 (D. C. N. D. Ohio 1950).

"The appellate courts in the federal domain have constantly admonished the trial courts against weighing affidavits and deciding the credibility of witnesses in a proceeding seeking summary judgment.

"For example, in Chappell v. Goltsman, supra, the court said:

> " 'It seems clear to us that the basis of the court's opinion was not that there were no genuine fact issues, but rather that there were such issues which it proceeded to decide adversely to appellants, although the motion raises questions of intent, unfair competition and perfidious dealings which ought not to have been disposed of by summary judgment and without trial on the merits.'

"And in Arnstein v. Porter, supra, the Court of Appeals for the Second Circuit said:

> " 'We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing sum-

> mary judgments, intended to permit a "trial by affidavits" if either party objects. That procedure, which, so the historians tell us, began to be outmoded at common law in the 16th century, would, if now revived, often favor unduly the party with the more ingenious and better paid lawyer. Grave injustice might easily result.' "

This Court has recently construed Federal Rule 56 in a similar manner. In the case of *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620 (1944), Justice Jackson stated (p. 627):

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Insurance Co. v. Gentile Brothers Co., 109 F. 2d 732; Whitaker v. Coleman, 115 F. 2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

The record in the present case discloses that the gravamen of petitioners' complaint is not predicated solely upon the mistake of fact and law by the trial court in granting the City's motion for summary judgment but is primarily based upon the denial by the trial court of petitioners' fundamental right to a trial upon whether the City of Trenton was exercising the power of eminent domain in good faith and for a necessary public purpose. That the fundamental issues of good faith and necessity were specifically raised by the pleadings and proofs submitted by petitioners, and that a genuine dispute existed upon these two material

questions of fact, has been fully demonstrated in earlier portions of this petition (pp. 4-8 ante).

The trial court was under the 1953 Eminent Domain Act obligated to determine after full inquiry the judicial question of whether the City of Trenton, although colorably complying with the statutory requirements of fulfilling a necessary public purpose and use and of acting in good faith in that respect, was in reality condemning petitioners' property unnecessarily and for a profitable private use. When, therefore, such a full inquiry was denied by the granting of a summary judgment, this constituted a denial of due process in violation of the Fourteenth Amendment.

The non-adherence to the procedural requirement of due process in a State condemnation proceeding involving the taking of private property for an alleged public use will justify the allowance by this Court of a writ of certiorari to review that proceeding. Although the term "due process of law" does not admit of specific definition applicable to all cases and must be determined in the light of the facts and circumstances of each case, yet this Court has repeatedly stated that the failure to pay just compensation, a prerequisite to the taking of private property for public use, constitutes a denial of due process. It is respectfully submitted that the prerequisites of good faith and the existence of a necessary public purpose or use are of equal importance; and where these prerequisites are not proved by the condemnor and are refuted by competent proofs to the contrary adduced by the private owner, the granting of condemnation without a full hearing thereon is a denial of due process because it deprives the private owner of a fundamental right. This is particularly true where, as here, the condemnation proceeding is a civil action, the trial court has express statutory authority to examine into and determine the right of the condemnor to exercise the power of eminent domain, and the burden of proving that the condemnation is for a bona fide and necessary public use has not been met by a condemnor charged

with seeking in bad faith the condemnation of private property for a private purpose.

The majority opinion concedes that the exercise of the discretionary power of eminent domain may be upset by the courts upon an affirmative showing of fraud, bad faith or manifest abuse and devotes considerable space to countering the charge and justifying its conclusion that the acts and conduct of the City of Trenton do not show fraud, bad faith or abuse in the determination to take petitioner's property. The fundamental error of the majority opinion lies in ignoring the affirmative proofs of petitioners and denying a full plenary hearing upon these controversial issues. The majority opinion justifies its denial of the fundamental right of trial upon the erroneous presumption that the City of Trenton intended and planned to build a multi-story ramp garage upon the condemned site in order to increase public parking facilities and also upon the conjectural surmise that once petitioners' property has been acquired the City of Trenton and its Board of Commissioners will somehow and at some future time determine in good faith the manner in which petitioners' property may and can be used to increase the public parking facilities of the City of Trenton.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Robert T. McCracken,
George G. Chandler,
Attorneys for Petitioners.